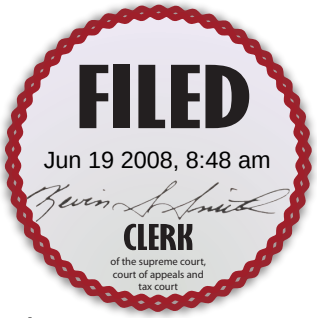

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IN THE COURT OF APPEALS OF INDIANA

JOHN W. MCMASTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A02-0712-CR-1027
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
Cause No. 35D01-0707-CM-570

June 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

John W. McMaster appeals his convictions and sentence for Public Indecency, as a Class A misdemeanor, and Battery, as a Class B misdemeanor, following a bench trial. McMaster presents the following issues for review:

1. Whether the evidence is sufficient to support his convictions.

2. Whether there was sufficient evidence to support his defense of entrapment.

3. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

We affirm in part and vacate in part.

FACTS AND PROCEDURAL HISTORY

In the summer of 2007, the property manager of Roush Lake, a public recreation area, lodged complaints with the Indiana Department of Natural Resources ("DNR") that someone was harassing and following the lake's patrons and making rude comments to them. As a result of the complaint, on July 11, DNR Detective Sergeant Gary Whitaker and Conservation Officer Justin Blake set up an undercover operation at the recreation area's pavilion. In the investigation, Detective Whitaker monitored the radio while Officer Blake, dressed in plain clothes and wearing a body wire, talked with the lake's patrons. Officer Blake was driving a van equipped with four perimeter cameras and microphones, and he parked near the archery range parking lot southeast of the pavilion. The officers had also set up video cameras along the trail to the west of the pavilion.

At approximately 10:55 a.m., McMaster drove up to the pavilion. Officer Blake exited his vehicle and sat on a picnic table. McMaster exited his vehicle and approached

Officer Blake. The two engaged in "basic conversation" about topics such as the weather, wildlife, California, and Hawaii. Transcript at 48. When McMaster brought up the topic of sexual orientation, the two men talked of that and their past sexual partners. McMaster said there was a trail west of the pavilion, and the two men walked down that trail.

McMaster stroked his genitals through his clothes as the men walked down the trail. Officer Blake asked if McMaster was "getting it ready," and McMaster answered affirmatively. Id. at 51. The men walked past the point on the trail where the video camera was located and down a mowed path before stopping. They began debating whether to walk further or to return to the pavilion[1] when McMaster grabbed Officer Blake's genitals. Officer Blake "kind of jumped back and pulled away," and McMaster commented that Officer Blake was nervous and jumpy. Id. at 52. McMaster attempted to grab Officer Blake's genitals again, and Officer Blake backed up. McMaster then asked whether it was okay for him to grab Officer Blake, but Officer Blake did not answer.

The men returned to the pavilion. While there, McMaster grabbed Officer Blake's leg. The men continued to discuss sexual activity while McMaster fondled himself. McMaster gave Officer Blake permission to touch McMaster's genitals. McMaster said he knew of a construction site where the two could engage in sexual activity. Officer Blake agreed to follow McMaster off the property. They drove their respective vehicles, and Officer Blake pulled out in front of McMaster. Officer Blake stopped at the radio controlled flying area driveway, where another officer arrested McMaster.

[1] Officer Blake wanted to return to the pavilion because he had received a text on his cell phone that his body microphone was not working properly.

The State charged McMaster with public indecency, as a Class A misdemeanor, and battery, as a Class B misdemeanor. McMaster filed a notice of intent to assert entrapment as a defense. A bench trial was held on September 11, 2007, after which the trial court took the matter under advisement. On September 17, the court found McMaster guilty as charged. The court sentenced him to 365 days for public indecency, with all but eight days suspended; 180 days for battery, with all but eight days suspended; and ordered the sentences to run concurrently. The court also ordered McMaster to serve informal probation for one year and to stay away from Roush Lake property. McMaster now appeals.

DISCUSSION AND DECISION

Issue One: Sufficiency of Evidence

McMaster contends that the State presented insufficient evidence to support his convictions for public indecency and battery. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To prove public indecency, as a Class A misdemeanor, the State was required to prove that McMaster, knowingly or intentionally and in a public place, fondled his genitals or the genitals of another person. See Ind. Code § 35-45-4-1(a)(4). McMaster

argues that he touched his knees, not his genitals. And Officer Blake conceded that not all of his encounter with McMaster was captured by video or audiotape. Nevertheless Officer Blake testified that he observed McMaster fondle his own genitals while the two men were on the trail and at the pavilion. Such evidence is sufficient to support McMaster's conviction for public indecency, as a Class A misdemeanor.

McMaster also argues on appeal that he never touched Officer Blake. But the State was only required to show that McMaster touched either his own genitals or those of another. We have already concluded that the evidence showing that McMaster fondled himself was sufficient. Moreover, Officer Blake testified that McMaster grabbed Officer Blake's genitals. The uncorroborated testimony of a single witness may be sufficient to sustain a conviction. See Miles v. State, 764 N.E.2d 237, 242 (Ind. Ct. App. 2002), trans. denied. McMaster's arguments amount to a request that we reweigh the evidence, which we cannot do. See Jones, 783 N.E.2d at 1139. Thus, we conclude that the evidence is sufficient to support the conviction for public indecency, as a Class A misdemeanor.

To prove battery, as a Class B misdemeanor, the State was required to prove that McMaster knowingly or intentionally touched another person in a rude, angry, or insolent manner. See Ind. Code § 35-42-2-1(a). In particular, the State was required to show that McMaster "grabbed the genitals of [Indiana Conservation Officer] Justin Blake." Appellant's App. at 6. As discussed above, Officer Blake's testimony that McMaster grabbed Officer Blake's genitals is sufficient to show that such conduct occurred. See Miles, 764 N.E.2d at 242.

But we note sua sponte that the convictions for battery and public indecency could have been based on the same evidence, namely, evidence that McMaster grabbed Officer Blake's genitals. Two offenses are the "same offense" in violation of the Indiana Double Jeopardy Clause if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Rutherford v. State, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007). Under the "actual evidence" test, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Id. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish all of the essential elements of a second challenged offense. Id.

"[T]he "proper inquiry" is not whether there is a reasonable probability that, in convicting the defendant of both charges, the [fact-finder] used different facts, but whether it is reasonably possible it used the same facts." Bradley v. State, 867 N.E.2d 1282, 1284 (Ind. 2007) (emphasis original). Here, there is a reasonable possibility that the trial court used the evidence that McMaster grabbed Officer Blake to convict McMaster of both public indecency and battery. Thus, Double Jeopardy is implicated. "When two convictions contravene double jeopardy principles, we may vacate one of the

convictions . . . ." Id. at 1285. Therefore, we must vacate McMaster's conviction for battery.[2]

Issue Two: Entrapment

McMaster next contends that his convictions should be reversed because he was entrapped.[3] Specifically, McMaster argues that there was evidence that Officer Blake induced McMaster's conduct and that McMaster was not predisposed to such conduct. We cannot agree.

This court reviews a claim of entrapment using the same standard that applies to challenges to the sufficiency of the evidence. Salamas v. State, 690 N.E.2d 762, 764 (Ind. Ct. App. 1998). As noted above, the court will neither reweigh the evidence nor judge the credibility of witnesses. Jones, 783 N.E.2d at 1139. We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id.

This court has described the defense of entrapment as follows:

> [Indiana Code Section] 35-41-3-9 governs the defense of entrapment and provides:
>
> (a) It is a defense that:

[2] Because the trial court imposed concurrent sentences and the longer sentence was imposed for public indecency, the vacation of McMaster's battery conviction does not affect his sentence.

[3] McMaster's argument on this issue was difficult to discern. In support of his argument he cites to Strong v. State, 591 N.E.2d 1048 (Ind. Ct. App. 1992), which addresses the right to have a jury instruction on the defense of entrapment. He concludes by stating that the "evidence supports allowing [McMaster] to assert the entrapment defense . . . ." Appellant's Brief at 12. But there is no indication in the record, nor has McMaster cited to anything in the record, to show that the trial court did not allow McMaster to assert that defense. Thus, we treat McMaster's argument as one challenging the sufficiency of the State's rebuttal of the entrapment defense.

> (1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and
>
> (2) the person was not predisposed to commit the offense.
>
> (b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

> In Indiana, the defense of entrapment turns upon the defendant's state of mind, or "whether the 'criminal intent originated with the defendant.'" "In other words, the question is whether 'criminal intent [was] deliberately implanted in the mind of an innocent person[.]'" "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play."
>
> The State may rebut this defense either by disproving police inducement or by proving the defendant's predisposition to commit the crime. If a defendant indicates that he intends to rely on the defense of entrapment and establishes police inducement, the burden shifts to the State to demonstrate the defendant's predisposition to commit the crime. "Whether a defendant was predisposed to commit the crime charged is a question for the trier of fact." The State must prove the defendant's predisposition beyond a reasonable doubt. "If the defendant shows police inducement and the State fails to show predisposition on the part of the defendant to commit the crime charged, entrapment is established as a matter of law."

Espinoza v. State, 859 N.E.2d 375, 385-86 (Ind. Ct. App. 2006) (emphasis original, citations omitted).

Here, McMaster argues that Officer Blake made the "first mention of anything sexual[.]" Appellant's Brief at 11. He points out that Officer Blake led the way down the trail when they left the pavilion; that the men said back and forth "let me see your thing,"[4] id.; that Officer Blake engaged McMaster in conversation about genitalia; and

[4] McMaster has misquoted the testimony here in a misleading fashion. Officer Blake testified, "I didn't directly say let me see your genitalia or let me see your penis or whatever but he . . . It was back and forth, let me see yours, let me see yours type thing." Transcript at 69.

that Officer Blake admitted to putting his leg up on the picnic table next to McMaster. McMaster further argues that he rubbed only his knees and never touched Officer Blake's genitals. He points out that he had been in a monogamous relationship for sixteen years and that Officer Blake kept looking at McMaster's crotch and licking his lips.

McMaster contends that such evidence shows both inducement and McMaster's lack of predisposition to have committed the offenses. But that argument amounts to a request that we reweigh the evidence, which, again, we cannot do. Jones, 783 N.E.2d at 1139. The evidence most favorable to the judgment shows that McMaster engaged Officer Blake in conversation about sexual orientation, genitalia, and his prior sexual partners and inquired about going off-site to engage in sexual activity with Officer Blake. The evidence also shows that McMaster fondled himself, both on the trail and at the pavilion, and that he grabbed Officer Blake's genitals. The evidence as a whole shows that McMaster had a predisposition to commit the crime charged. By showing McMaster's predisposition, the State has adequately rebutted the defense of entrapment. See Espinoza, 859 N.E.2d at 386.

Issue Three: Appellate Rule 7(B)

McMaster contends that his sentence is inappropriate in light of the nature of the offenses and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)) (alteration original),

clarified in part on other grounds, 875 N.E.2d 218 (Ind. 2007). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Under Appellate Rule 7(B), we assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Anglemyer, 868 N.E.2d at 494 (quoting Childress, 848 N.E.2d at 1080) (alteration in original).

McMaster contends that his one-year sentence is inappropriate in light of the nature of the offenses.[5] McMaster was convicted of public indecency based on evidence that he fondled himself in front of an undercover officer in a state recreation area, both on a trail and at a picnic table on the pavilion. McMaster engaged the officer in conversation regarding sexual orientation and genitalia, including a presumed description of the officer's genitalia, and he asked if the officer wanted to go to another location to engage in sexual activity. And McMaster grabbed Officer Blake's genitals once, trying unsuccessfully a second time. A state recreation area is a public place where families and children might congregate. We cannot say that the one-year sentence, which was suspended to eight days, is inappropriate in light of the nature of the offenses.

McMaster also contends that his sentence is inappropriate in light of his character. In that regard, he argues in part that the "'maximum sentence should be reserved for the

[5] In support, McMaster cites to Campbell v. State, 820 N.E.2d 711 (Ind. Ct. App. 2004), to show that Appellate Rule 7(B) "speaks to the statutory presumptive sentence for the class of crimes to which the offense belongs" as the starting point for sentencing. Appellant's Brief at 12. But there is no presumptive sentencing for misdemeanors. Thus, Campbell is inapposite.

very worst offenses, and offenders.'" Appellant's Brief at 14. We addressed that argument generally in Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied:

> There is a danger in applying this principle . . . . If we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. . . . This leads us to conclude the following with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, thus justifying the maximum sentence: We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

In other words, we consider the inappropriateness of McMaster's sentence under Appellate Rule 7(B) and need not consider hypothetical situations necessary to evaluate the "worst of the offenders" argument.

Here, McMaster points out that he has no criminal history, yet the court imposed the maximum sentence of 365 days for public indecency, as a Class A misdemeanor. The record contains scant evidence of McMaster's character, though it shows that he was forty-two years old and lived with his mother, serving as her primary caregiver, and his long-time male companion. McMaster testified that he worked at a business called "Wings," although he also stated that he could not leave his mother alone. But McMaster perpetrated the offenses in a public place, where families and children meet for recreation, and he initiated the sexual behavior by fondling himself in the open and in front of Officer Blake. We cannot say that McMaster's one-year sentence, suspended to eight days, is inappropriate in light of his character.

Affirmed in part and vacated in part.

DARDEN, J., and BROWN, J., concur.